No. 75-977

Supreme Court, U. S.
FILED
APR 9 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

ACCURACY IN MEDIA, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-31a) is reported at 521 F.2d 288. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1a-14a) is reported at 43 FCC 2d 851.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1975, and the petition for a writ of certiorari was filed on January 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the statutory scheme of the Federal Communications Act, the Federal Communications Commission is authorized to enforce against the Corporation for Public Broadcasting the requirement in Section 396 (g)(1)(A) of the Act that controversial programs made available to noncommercial broadcasting stations must be objective and balanced.

STATEMENT

The facts, as set forth in the opinion of the Commission (Pet. App. 1a-8a) and the court of appeals (Pet. App. 15a-17a), are as follows:

In 1971, petitioner filed complaints with the Federal Communications Commission charging that two programs funded by the Corporation for Public Broadcasting ("the Corporation") and supplied to noncommercial broadcasting stations by the Public Broadcasting Service ("PBS") violated both the Commission's fairness doctrine and Section 396(g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. 396(g)(1)(A), because they were not a balanced or objective presentation of the subject. The latter provision authorizes the Corporation to

> facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature * * * .

The Commission held (1) that the Corporation had not violated the fairness doctrine,[1] and (2) that it had no

[1]Petitioner did not seek judicial review of the Commission's fairness doctrine ruling (Pet. App. 16a).

jurisdiction to enforce Section 396(g)(1)(A) against the Corporation. In making the latter ruling, the Commission held that Section 398 of the Act, 47 U.S.C. 398, which provides that nothing in Sections 390 to 399 (Part IV of Title III) of the Act (which include the Communications Act provisions relating to the Corporation), authorizes any government agency to "exercise any direction, supervision, or control over * * * the Corporation * * * ," "makes clear that the creation of the Corporation * * * by the Public Broadcasting Act of 1967 should not be construed as conferring regulatory or supervisory jurisdiction over that Corporation in the Commission unless some provision of the Act outside of Part IV either specifically confers such jurisdiction or requires it as a necessary part of the achievement of the Commission's functions" (Pet. App. 5a). The Commission ruled that no other provision of the Act either confers or requires such jurisdiction over the Corporation, which does not "operate licensed broadcast facilities" or "own or operate any interconnection or program production facilities" and "is not engaged in the interstate transmission of communications or energy by wire or radio" (*ibid.*).

The Commission also concluded that the legislative history of the Public Broadcasting Act of 1967, which created the Corporation, showed "the clear, if unspecific, intent of Congress to keep the Corporation free of government control * * * " (Pet. App. 7a). The Commission concluded that it would be "inappropriate" for it "to interpret for the guidance of the Corporation the meaning of the words 'strict adherence to objectivity and balance in all programs or series of programs of a controversial nature' " (Pet. App. 8a).

The court of appeals affirmed. Like the Commission, the court relied upon the language, statutory scheme and legislative history of the statute, and pointed out (Pet. App. 23a) that "any FCC jurisdiction over the

[Corporation] would constitute a radical extension of the FCC's basic jurisdictional grant. * * * No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity [such as the Corporation] not engaged in 'communication by wire or radio.' "

ARGUMENT

The court of appeals' decision is correct, there is no conflict of decisions, and further review is unwarranted.

The language of the Act shows that Congress did not intend the Commission to enforce Section 396(g)(1)(A) against the Corporation. As both the Commission and the court of appeals held (Pet. App. 4a, 20a-21a), Section 398 of the Act, which provides that "[n]othing contained in sections 390 to 399 of this [Act] * * * authorize[s] any * * * agency * * * of the United States to exercise any direction, supervision, or control over * * * the Corporation * * * ," precludes the Commission from enforcing against it the "objectivity and balance" standard in Section 396(g)(1)(A).[2] If the Commission were to attempt to require the Corporation to comply with that standard, which deals with the contents of the programs the Corporation makes available to noncommercial broadcasting stations, the agency would be exercising "direction," "supervision" and "control" over the Corporation.

As the court of appeals pointed out, granting the Commission such supervisory authority over the Corporation "would constitute a radical extension of the [Commis-

[2]Contrary to petitioner's contention (Pet. 11), with respect to the Corporation this conclusion is not inconsistent with Section 399 of the Act, 47 U.S.C. (Supp IV) 399, which gives the Commission a limited supervisory role over licensees. As explained in the text, the Corporation is not a licensee.

sion's] basic jurisdictional grant" (Pet. App. 23a). The corporation neither owns nor operates any communication facilities, and indeed is expressly prohibited from doing so. Section 396(g)(3). Since it merely provides funds for the production of programs, it is not "engaged in the interstate transmission of communications or energy by wire or radio" (Pet. App. 5a; see 47 U.S.C. 151, 152, 301).

The Commission has never exercised jurisdiction over such an entity and the courts traditionally have been "hesitant to conclude that Congress intended to grant" a regulatory agency "other than the customary power" in the absence of clear legislative history that it did so. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 546. There is no legislative history indicating that Congress intended to give the Commission regulatory power over the Corporation.

The legislative history in fact confirms that Congress did not intend the Commission to enforce Section 396(g)(1)(A) against the Corporation. See, *e.g.*, H.R. Rep. No. 572, 90th Cong., 1st Sess. 19 (1967). As the court of appeals pointed out (Pet. App. 24a), instead of supervision by the Commission, Congress designed a "carefully balanced framework * * * for the control of [the Corporation's] activities," which in large part depends upon the power of Congress to appropriate money for the Corporation. See 47 U.S.C. 396(k). The court of appeals correctly concluded that Congress "reserved for itself the oversight responsibility for the Corporation" (Pet. App. 25a). Congress intended the Commission to regulate the activities of the noncommercial segment of the broadcasting industry, but as the Commission and court noted (Pet. App. 8a, 27a-28a), it contemplated that such authority would be exercised over licensees, and not over the Corporation.

The Commission's interpretation of the statute as not authorizing it to enforce Section 396(g)(1)(A) against the Corporation reflects the agency's settled practice, the statutory language and scheme, and the legislative history. This construction is entitled to substantial weight. Cf. *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349, 352.

Contrary to petitioner's contention (Pet. 15-17), the decision of the court of appeals does not conflict with any decision of this Court. Each of the cases petitioner cites involved entities engaged in wire or radio communications;[3] the Corporation, however, is prohibited from such activity. Those decisions, which are fully consistent with the congressional intention to give the Commission broad authority over wire and radio communications, do not support petitioner's attempt to extend the agency's power into new areas.

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[3] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, and *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, both involved the Commission's regulation of radio stations which it licensed under the Act. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, involved Commission authority to regulate cable television, which the court of appeals here correctly pointed out (Pet. App. 23a, n. 22), "was an unforeseen *technological* innovation at the time of the 1934 Communications Act; Congress intended to include forthcoming scientific improvements within the FCC's jurisdiction. The [Corporation], however, was not a technological innovation and was created by Congress itself. The intended limits to FCC regulation thus could have been changed and were not."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1976.

DOJ-1976-04